No. 05-353

In The Supreme Court of the United States

PEABODY WESTERN COAL COMPANY
and PEABODY COAL COMPANY, LLC,

Petitioners,

v.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE THE NAVAJO NATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

LOUIS DENETSOSIE
Attorney General
THE NAVAJO NATION
P.O. Box 2010
Window Rock, AZ 86515

PAUL E. FRYE
(Counsel of Record)
FRYE LAW FIRM, P.C.
10400 Academy Rd. NE #310
Albuquerque, NM 87111
(505) 296-9400

December 19, 2005

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a plaintiff may join as an involuntary defendant under Federal Rule of Civil Procedure 19 a party which the plaintiff is prohibited from suing directly.

TABLE OF CONTENTS

	Page
Question Presented	i
Interest of the Amicus	1
Argument	3
I. Important Federal and Tribal Interests Are at Stake	3
II. The Petition Should Be Granted Because the Decision below Conflicts with Decisions in Other Circuits, and Applies Rule 19 to Effect a Judicial Abrogation of Navajo Sovereign Immunity in Contravention of Title VII Itself and in Violation of the Rules Enabling Act and Rule 82	9
A. Title VII Did Not Abrogate Tribal Sovereign Immunity or Treaty Provisions, and It Preserved Preexisting Employment Preferences in Indian Country	10
B. The Ninth Circuit's Ruling Violates the Rules Enabling Act and Rule 82	13
C. Even if Congress Had Permitted Suits Against Indian Tribes in Title VII, It Expressly Withheld that Power from the EEOC	15
Conclusion	17

TABLE OF AUTHORITIES

Page

CASES

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) 4

Dille v. Council of Energy Resource Tribes, 801 F.2d 373 (10th Cir. 1986) 11

EEOC v. Peabody Coal Co., 214 F.R.D. 549 (D. Az. 2002), rev'd, 400 F.3d 774 (9th Cir. 2005) 1, 2, 3, 9

Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998) 7, 12, 14

Lincoln Property Co. v. Roche, No. 04-712, 2005 WL 3158018 (U.S. Nov. 29, 2005) 13

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 9

MacArthur v. San Juan County, 391 F. Supp. 2d 895 (D. Ut. 2005) 7

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 4

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) 12

Natonabah v. Board of Educ., 355 F. Supp. 716 (D.N.M. 1973) 5

Nevada v. United States, 463 U.S. 110 (1983) 2, 15

NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002) 4

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991) 8, 13

TABLE OF AUTHORITIES – Continued

Page

Orff v. United States, 545 U.S. ___, 125 S. Ct. 2606 (2005) 14

Puyallup Tribe, Inc. v. Department of Game of State of Washington, 433 U.S. 165 (1977) 13, 14

Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832 (1982) 5

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 4, 8, 12, 13

United States ex rel. Hall v. Tribal Devel. Corp., 100 F.3d 476 (7th Cir. 1996) 17

United States v. Dion, 476 U.S. 734 (1986) 12

United States v. Mottaz, 476 U.S. 834 (1986) 14

United States v. Navajo Nation, 537 U.S. 488 (2003) 1

United States v. Shaw, 309 U.S. 495 (1940) 8

United States v. Sherwood, 312 U.S. 584 (1941) 8, 13

United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940) 7, 13, 15

United States v. Wheeler, 435 U.S. 313 (1978) 4

Williams v. Lee, 358 U.S. 217 (1959) 3, 4, 7

Wichita and Affiliated Tribes v. Hodel, 788 F.2d 765 (D.C. Cir. 1986) 13

Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir.), cert. denied, 464 U.S. 1017 (1983) 16

Yazzie v. Morton, 59 F.R.D. 377 (D. Az. 1973) 7, 16

TABLE OF AUTHORITIES – Continued

Page

TREATIES, STATUTES AND RULES

Treaty with the Navaho, 9 Stat. 974 (1850) 4

Treaty with the Navaho, 15 Stat. 557 (1868) 4

5 N.N.C. § 401 6

5 N.N.C. § 403 6

15 N.N.C. §§ 601-19 6

25 U.S.C. § 81 7

25 U.S.C. § 175 16

25 U.S.C. §§ 631-38 5

25 U.S.C. § 631 5

25 U.S.C. § 633 ..... 1, 5

25 U.S.C.A. §§ 639, 640 5

28 U.S.C. § 519 17

28 U.S.C. § 2072(b) 13

42 U.S.C. § 2001e(b)(1) 10

43 U.S.C. § 390uu 14

Fed. R. Civ. P. 19 ..... *passim*

REGULATIONS

25 C.F.R. § 211.54 16

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

H.R. Rep. No. 963, 81st Cong., 1st Sess. 2 (1949) 5

S. Rep. No. 550, 81st Cong., 1st Sess. 3 (1949) 6

110 Cong. Rec. Sen. 12,723 (1964) 11

110 Cong. Rec. Sen. 13,702 (1964) 11

61 Fed. Reg. 29,424 (1996) 16

61 Fed. Reg. 35,634 (1996) 16

Conference Rep. No. 1892, 81st Cong., 2d Sess. (1950), reproduced at 1950 U.S. Code Cong., and Adm. News 2013 5

Phillip P. Frickey, Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law, 107 Harv. L. Rev. 381 (1993) 8

In Defense of Tribal Sovereign Immunity, 95 Harv. L. Rev. 1058 (1982) 8, 9

United States Comm'n on Civil Rights, The Navajo Nation: An American Colony 41 (1975) 2

INTEREST OF THE AMICUS[1]

The Navajo Nation has a direct interest in this case. The Department of the Interior, in its capacity as trustee for the Navajo Nation, drafted and approved leases of Navajo coal in favor of Petitioner Peabody Coal Company and included in those leases a requirement that Peabody give preference in employment to qualified Navajo workers. *See United States v. Navajo Nation*, 537 U.S. 488, 507 (2003); *EEOC v. Peabody Coal Co.*, 214 F.R.D. 549, 555, 561-62 (D. Az. 2002), *rev'd on other grounds*, 400 F.3d 774 (9th Cir. 2005). Although that lease term is permitted by federal law, 25 U.S.C. § 633, the Equal Employment Opportunity Commission sued Peabody for complying with it. That lease term has been included in leases approved and rights-of-way granted on the Navajo Reservation by the Secretary of the Interior for over a half century, and agreements requiring that preference in Reservation employment be given to qualified Navajo applicants number well into the hundreds. Such lease provisions are a primary, bargained-for consideration on the part of the Navajo Nation.

The District Court granted Peabody's motion to dismiss, principally because the Navajo Nation is an indispensable party under Fed. R. Civ. P. 19 that the EEOC cannot join under Title VII of the Civil Rights Act of 1964 or otherwise. *EEOC*, 214 F.R.D. at 557-59. The Court of Appeals reversed, holding that the EEOC could join the Navajo Nation under Rule 19, notwithstanding the

---

[1] No person other than amicus and its counsel participated in the writing of this brief or made a financial contribution to the brief. Letters signifying the parties' consent to the filing of this brief are on file with the Court.

EEOC's inability to sue the Navajo Nation directly because of Navajo sovereign immunity and the conceded prohibition placed by Congress on the EEOC's authority to proceed in cases involving governments under Title VII. *EEOC v. Peabody Coal Co.*, 400 F.3d 774 (9th Cir. 2005). Subsequent to the Ninth Circuit's ruling, Peabody formally notified the Navajo Nation that it intended to bring a cross-claim against the Navajo Nation seeking, in effect, to void employment preference provisions in the lease and to invalidate the Navajo Preference in Employment Act, 15 N.N.C. §§ 601-19 (1995), which has governed employment practices on the Reservation since 1985.

The Ninth Circuit's ruling constitutes an unauthorized abrogation of Navajo sovereign immunity and contravenes Congress' careful allocation of power between the EEOC and the Attorney General. The Navajo Nation faces an infrastructure deficit of over $3.7 billion compared with similar adjacent rural areas. *See* United States Comm'n on Civil Rights, *The Navajo Nation: An American Colony* 41 (1975). The unemployment rate on the Reservation is 42%. The Navajo Nation cannot afford to spend scarce resources to defend litigation brought by one arm of the federal government challenging the terms of leases drafted and approved by another arm of the federal government, the Department of the Interior, which has primary responsibility for the fulfilment of the federal trust relationship, *see Nevada v. United States*, 463 U.S. 110, 135 n.15 (1983).

The Ninth Circuit's Rule 19 ruling implicates fundamental aspects of Navajo sovereignty, the relationship between the Navajo Nation and the United States under treaties and federal statutes, and the sanctity of federally approved leases of Navajo land. Peabody understandably has not focused on these interests. The accompanying brief

of the Navajo Nation does, so that the Court may evaluate the Petition with reference to all of the significant issues.

ARGUMENT

I. IMPORTANT FEDERAL AND TRIBAL INTERESTS ARE AT STAKE.

The Ninth Circuit's decision threatens important tribal and federal interests. First, as the Petition persuasively shows, Congress carefully reserved to the Attorney General the discretion to proceed in Title VII cases involving governments, and the Ninth Circuit's decision upsets that delicate balance. Other significant federal and tribal interests are implicated because the judicial abrogation of Navajo sovereign immunity by the Ninth Circuit was in service of the goal of the EEOC to "not only seek to void or rework the Navajo Nation's Coal Leases, but also to seek to enjoin the Navajo Nation from enforcing its Navajo Preference in Employment Act." *EEOC*, 214 F.R.D. at 561. The decision below therefore undermines the Navajo Nation's right to be free from unconsented-to lawsuits, and threatens the fundamental rights of the Navajo Nation, implemented in close cooperation with the Department of the Interior, to exclude or condition the entry of nonmembers seeking to do business in the tribal territory, to oversee economic activity on the Reservation, and to set labor policy for the training and employment of tribal members. These are important federal and tribal interests. *See Williams v. Lee*, 358 U.S. 217, 221, 223 (1959) (Treaty with the Navajo "provided that no one, except United States Government personnel, was to enter the reserved area"; cases of the Court "have consistently guarded the authority of Indian governments over their reservations.

Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since."); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 217 (1987) (tribal self-sufficiency and economic development are "important federal interests"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64 (1978) (abrogation of tribal sovereign immunity by implication is "inconsistent with the congressional goal of protecting tribal self-government"); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1200 (10th Cir. 2002) (*en banc*) (enactment of tribal law that requiring, *inter alia*, preferential hiring to tribal members is "clearly an exercise of sovereign authority over economic transactions on the reservation").

Two treaties form the foundation of the federal/Navajo relationship. *See United States v. Wheeler*, 435 U.S. 313, 324 n.20 (1978). In the first, the Navajo Tribe submitted to the Government's "sole and exclusive right of regulating the trade and intercourse" with the Navajo, and the United States promised in return to "legislate and act as to secure the permanent prosperity and happiness" of the Navajo people. Treaty with the Navaho, Art. III, XI, 9 Stat. 974-75 (1850). The second, ratified in 1868, guaranteed the fundamental right of the Navajo Tribe to exclude nonmembers from entering the Reservation. *Williams v. Lee*, 358 U.S. at 221. This right necessarily includes the lesser right of conditioning the entry of nonmembers seeking to do business in the tribal territory. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982).

Congress has legislated to implement the Treaties and to protect these fundamental interests. Although the Navajo Nation is now the country's largest Indian nation, with territory covering over 25,000 square miles, the Navajo people have experienced poverty not found elsewhere in the

United States. Having defaulted on its treaty commitment to provide schools for the Navajo,[2] the Government found in 1948 that the median education level of Navajos was less than one year, that 80% of Navajos were illiterate and 65% spoke no English. Conference Rep. No. 1892, 81st Cong., 2d Sess. (1950), reproduced at 1950 U.S. Code Cong., and Adm. News 2013, 2014. The shocking economic conditions on the Reservation motivated Congress to pass the Navajo and Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631-38. That legislation "represent[ed] a new approach in the field of Indian affairs. For the first time, there [was] placed before the Congress in one bill a composite statement of the needs of the Indians in a specific area. Up to [then], the needs of the Indians ha[d] been presented by function, such as education and health, on a Nation-wide basis, rather than by area." H.R. Rep. No. 963, 81st Cong., 1st Sess. 2 (1949); S. Rep. No. 550, 81st Cong., 1st Sess. 3 (1949) (reproducing Statement of Secretary of the Interior Krug). The Rehabilitation Act specifically authorizes Navajo-specific employment preferences. 25 U.S.C. § 633. Portions of the Rehabilitation Act have been amended or repealed by Congress on four occasions, including twice after the passage of Title VII in 1964, *see* notes following 25 U.S.C.A. §§ 639, 640, but Congress has left intact the section permitting tribal-specific employment preferences.

The Rehabilitation Act initially focused on federal construction of roads and schools. *See* 25 U.S.C. § 631. But

---

[2] *See* 26 Cong. Rec. 7703 (1894). Discrimination by state school districts exacerbated the problem. *See, e.g., Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 834 (1982) (referring to the Navajo school "children abandoned by the State"); *Natonabah v. Board of Educ.*, 355 F. Supp. 716, 719 (D.N.M. 1973).

as predicted, the initial expenditures authorized in the Rehabilitation Act did "not complete the job," *see* S. Rep. No. 550 at 7 (reproducing Statement of Assistant Secretary of the Interior Warne), and the Navajo Nation complemented the Treaties and the Rehabilitation Act with legislation of its own. In 1970, the Navajo Tribal Council enacted legislation effectuating the Navajo Nation's power to exclude and "to promote the further economic development of the Navajo People." *See* 5 N.N.C. § 401 (1995). In that law, the Council expressly retained the Navajo Nation's power to grant, deny, continue or withdraw the privilege of doing business on the Navajo Reservation. *Id.* That privilege was conditioned on "the business' compliance with the applicable laws of the Navajo Nation and upon the continuing effect or validity of prior leases . . . authorizing the business to enter upon lands subject to the jurisdiction of the Navajo Nation." *Id.* § 403. Those federally approved leases – now numbering over five hundred – require the lessees to grant preference in employment to qualified Navajo applicants.

In 1985 the Navajo Tribal Council passed the Navajo Preference in Employment Act ("NPEA"), 15 N.N.C. §§ 601-19 (1995), implementing as a matter of tribal law the employment preference provisions of the Rehabilitation Act. That law generally imposes an affirmative action obligation on employers and requires employers to hire Navajo applicants who "demonstrate[] the necessary qualifications for an employment position." 15 N.N.C. § 604(B), (C)(1). Nonetheless, unemployment of Navajos on their own Reservation is still 42%. The EEOC is apparently unconcerned, and the Ninth Circuit's decision imperils the continued effectiveness of several hundred commercial leases and rights-of-way approved or granted

by the United States. The employment preference provision in all of these leases is "a right the Tribe contracted for its members" and constitutes valuable consideration for the lease rights granted. *Yazzie v. Morton*, 59 F.R.D. 377, 382 (D. Az. 1973); *see generally MacArthur v. San Juan County*, 391 F. Supp. 2d 895, 975-78 (D. Ut. 2005) (discussing the NPEA and concluding that its provisions "reflect the obvious exercise of the Navajo Nation's acknowledged power to 'make their own laws and be ruled by them,' *Williams v. Lee*, even with respect to relationships with non-Navajo employers").

Finally, the ruling of the Ninth Circuit directly implicates the sovereign immunity of the Navajo Nation. "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998).[3] This Court has consistently rejected attempts to circumvent tribal sovereign immunity through manipulation of the Rules of Civil Procedure or other means. For example, the Court in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-14 (1940), rejected an attempt to sue two tribes "whether directly or by cross-action" even though complete relief was unavailable in the tribes' absence, and rejected the attempt to obtain relief against the tribes by suing federal officials. In so holding, the Court analogized the tribes' sovereign immunity to that of

[3] This Court invited Congress to consider the doctrine of tribal sovereign immunity in *Kiowa*. 523 U.S. at 759-60. Congress did so in 2000, amending the 1870 law that governs all contracts and agreements with Indian tribes to require generally that such contracts include provisions for remedies and either a straightforward assertion of sovereign immunity or waiver of that immunity. *See* 25 U.S.C. § 81.

the United States as dominant sovereign, and relied on *United States v. Shaw*, 309 U.S. 495 (1940), in ruling that cross-suits against the tribes could be maintained only in those courts where Congress had consented to their consideration. *See also United States v. Sherwood*, 312 U.S. 584, 589-91 (1941) (rejecting as inconsistent with the Rules Enabling Act an attempt to circumvent the Government's sovereign immunity through joinder under the Federal Rules of Civil Procedure). In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509-10 (1991), the Court held that tribal sovereign immunity could not be defeated through the assertion of a compulsory counterclaim under Rule 13. Similarly, in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978), the Court rejected an attempt to circumvent tribal sovereign immunity by suing tribal officers, ruling that a clear statement by Congress of its intention to permit such intrusions into tribal affairs was needed to sustain such action.

Such a clear statement rule is appropriate in part because of the high cost of civil litigation in federal district courts and the limited resources of most tribes. *Martinez*, 436 U.S. at 64-65 & n.19; *see generally* Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058, 1073 & nn.91-92 (1982). More generally, the clear statement requirement honors the allocation of federal power in Article I, § 8 of the Constitution, with important structural and practical benefits. *See* Phillip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 428 (1993). By contrast, the "incremental invasions" into tribal sovereign immunity countenanced by the Ninth Circuit in this case "are an intrusion not only on the

tribes, but on Congress as well," because of Congress' exclusive power over commerce with the Indian nations. *See In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. at 1072 & n.83, *citing Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

The EEOC candidly informed the District Court that it needs to evade the Navajo Nation's sovereign immunity in order to defeat fundamental federal and tribal interests. *EEOC*, 214 F.R.D. at 561 ("In fact, the EEOC has indicated that it intends not only to seek to void or rework the Navajo Nation's Coal Leases, but also to seek to enjoin the Navajo Nation from enforcing its Navajo Preference in Employment Act."). The Ninth Circuit's ruling glosses over those important interests, dismisses express restrictions in Title VII that limit the EEOC's power to act in cases involving governments, and uses Rule 19 to defeat substantive rights of the Navajo Nation in violation of the Rules Enabling Act and Rule 82. The Navajo Nation respectfully urges the Court to grant the Petition and correct the error below.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS IN OTHER CIRCUITS, AND APPLIES RULE 19 TO EFFECT A JUDICIAL ABROGATION OF NAVAJO SOVEREIGN IMMUNITY IN CONTRAVENTION OF TITLE VII ITSELF AND IN VIOLATION OF THE RULES ENABLING ACT AND RULE 82.

The Petition identifies cases decided in other circuits conflicting with the decision below, and the Navajo Nation will not repeat that discussion here. The conflict among

the lower courts is a sufficient basis for granting the Petition.

In addition, the decision below applies Rule 19 in a manner that improperly contravenes express exceptions and limitations of Title VII itself, abrogates Navajo Nation sovereign immunity without Congressional sanction, and violates the Rules Enabling Act and Rule 82.

A. Title VII Did Not Abrogate Tribal Sovereign Immunity or Treaty Provisions, and It Preserved Preexisting Employment Preferences in Indian Country.

Two sections of Title VII relate to Indian tribes and on-reservation employment. First, in the definition section, any "Indian tribe" is excluded from the definition of an "employer." 42 U.S.C. §2001e(b)(1). Second, Congress exempted from Title VII's coverage "any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation." *Id.* § 2000e-2(i). More generally, Title VII carefully restricted the ability of the EEOC to act in cases "involving a government, governmental agency, or political subdivision." *See id.* § 2005e-5(f)(1) (providing for notification to aggrieved parties and the filing of civil actions by "the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision"). Filing an action in such cases is reserved to the Attorney General. *See id.* ("In the case of a respondent which is a government, governmental agency, or political subdivision, . . . the Commission shall take no further action and shall

refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court.").

Both of the Indian provisions were authored by Senator Mundt. *See* 110 Cong. Rec. Sen. 13,702 (1964). In explaining these provisions, Senator Mundt stated that they "would provide to American Indian tribes in their capacity as a political entity, the same privileges accorded to the U.S. Government and its political subdivisions, to conduct their own affairs and economic activities without consideration of the provisions of the bill." *Id.*; *see Dille v. Council of Energy Resource Tribes*, 801 F.2d 373, 375 (10th Cir. 1986). Senator Mundt concluded by stating that the provisions "will assure our American Indians of the continued right to protect and promote their own interests and *to benefit from Indian preference provisions now in operation or later to be instituted.*" 110 Cong. Rec. Sen. 13,702 (1964) (emphasis added). Senator Humphrey immediately expressed his own comfort with the provisions, because "[a]ny economic activity on the part of the Indian tribes must have the approval of the Secretary of the Interior."[6] *Id.* Clearly, the 1950 Rehabilitation Act was one of the "Indian preference provisions now in operation," and each Secretary of the Interior for over a half-century has included Navajo preference provisions in leases of and rights-of-way over Navajo land.

---

[6] Senator Humphrey had introduced the series of amendments that included the one exempting Indian preference programs with the following justification: "This exemption is consistent with the Federal Government's policy of encouraging Indian employment and with the special legal position of Indians." 110 Cong. Rec. Sen. 12,723 (1964).

Nowhere in Title VII is there any congressional provision abrogating tribal sovereign immunity. As this Court has observed, Congress is quite capable of providing for suits against Indian nations when it deems appropriate. *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 758-59 (1998). A "proper respect for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent" to abrogate tribal sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). Similarly, "Indian treaty rights are too fundamental to be easily cast aside," *United States v. Dion*, 476 U.S. 734, 739 (1986); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999), and Title VII evidences no clear legislative intent to abrogate the fundamental right of the Navajo Nation to condition the entry of nonmembers seeking to do business within the Navajo Reservation.

By contrast, the EEOC seeks (and obtained from the Ninth Circuit) a judicial abrogation of Navajo sovereign immunity which would diminish the fundamental rights of the Navajo Nation as sovereign and landowner, including the Navajo Nation's treaty right to exclude or condition the entry of those seeking to do business on Navajo lands. The Ninth Circuit merely glanced at those tribal interests and at the relief actually sought by the EEOC against the Navajo Nation. Its decision that the suit could be maintained against the Navajo Nation as a "Rule 19 defendant" or otherwise is contrary to settled precedents of this Court.

B. The Ninth Circuit's Ruling Violates the Rules Enabling Act and Rule 82.

The decision below relies entirely on Rule 19 as the vehicle to allow suit against the Navajo Nation by the EEOC. Such use of Rule 19 violates the Rules Enabling Act and Rule 82. When Congress authorized the Supreme Court to prescribe rules of procedure for the district courts, it provided that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Rule 82 complements that admonition, stating that the Federal Rules of Civil Procedure "shall not be construed to extend or limit the jurisdiction of the United States district courts. . . ." Fed R. Civ. P. 82. *See Lincoln Property Co. v. Roche*, No. 04-712, 2005 WL 3158018, at *6 (U.S. Nov. 29, 2005) (Rule 19 "address[es] party joinder, not federal-court subject-matter jurisdiction," citing Rule 82).

Federal or tribal sovereign immunity is a "substantive right" that is protected under the Rules Enabling Act. *See, e.g., United States v. Sherwood*, 312 U.S. 584, 589 (1940); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509-10 (1991); *see generally Wichita and Affiliated Tribes v. Hodel*, 788 F.2d 765, 773-74 (D.C. Cir. 1986) ("An Indian tribe's immunity is co-extensive with the United States' immunity. . . ."), citing, *inter alia United States Fidelity & Guaranty*. The sovereign immunity of the United States or an Indian tribe is jurisdictional. *Sherwood*, 312 U.S. at 586-87; *Puyallup Tribe, Inc. v. Department of Game of State of Washington*, 433 U.S. 165, 172-73 (1977); *Martinez*, 436 U.S. at 58; *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 509; *United States Fidelity & Guaranty*, 309 U.S. at 512.

The decision below permits suit against the Navajo Nation through the innovative use of Rule 19, where plaintiff EEOC avowedly seeks to void or modify Navajo leases and to prohibit the Navajo Nation from exercising its fundamental treaty right to exclude or condition the entry of nonmembers seeking to do business on Navajo land. Such use of Rule 19 violates the Rules Enabling Act because it abridges the Navajo Nation's sovereign immunity, and it violates Rule 82 by expanding the jurisdiction of the district court to entertain a suit against the Navajo Nation notwithstanding tribal sovereign immunity left intact by Congress.

This is not to say that Congress cannot abrogate tribal sovereign immunity or provide for third-party joinder of Indian tribes or other sovereigns, such as states. *See generally Kiowa*, 523 U.S. at 759 ("Congress, subject to constitutional limitations, can alter [the] limits [of tribal immunity] through explicit legislation."). Congress not only knows how to limit the sovereign immunity of other sovereigns when it wants to, *Kiowa*, 523 U.S. at 758-59, but it also knows how to permit joinder of sovereigns under Rule 19 when it deems appropriate. *See Orff v. United States*, 545 U.S. ___, 125 S. Ct. 2606 (2005) (construing 43 U.S.C. § 390uu, which provides that "[c]onsent is given to join the United States as a necessary party defendant in any suit to adjudicate . . . the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law"). But even in cases where such consent or joinder is permitted, that consent must be strictly construed in favor of the sovereign entity. *See, e.g., United States v. Mottaz*, 476 U.S. 834, 845-46 (1986) (construing 25 U.S.C. § 345);

United States Fidelity & Guaranty, 309 U.S. at 512-13; *Orff*, 125 S. Ct. at 2609-11.

Congress granted no consent to sue an Indian tribe to void its leases or invalidate its laws. The use of Rule 19 to defeat Navajo sovereign immunity and to diminish treaty-based rights contravenes the Rules Enabling Act and Rule 82.

C. Even if Congress Had Permitted Suits Against Indian Tribes in Title VII, It Expressly Withheld that Power from the EEOC.

As shown above and as the Petition amply demonstrates, Congress empowered the EEOC to bring civil actions against employers, but withheld the power to proceed in any case "involving" a government or a government agency. In such cases, Congress required that the matter be referred to the Attorney General.

This case "involves" in significant ways not only the Navajo Nation, but also one other government agency, the United States Department of the Interior. The Department is the focal point of the Government's trust relationship with the Navajo Nation and other Indian tribes. *Nevada v. United States*, 463 U.S. 110, 135 n.15 (1983). As trustee it has drafted and/or approved several hundred leases of, and rights-of-way over, Navajo Nation trust lands. These contracts involve energy production and transmission and other commerce vital to the Navajo Nation and to the United States as a whole. Under federal law, cancellation of a lease or invalidation of a lease term requires the

participation of the Department. *See* 25 C.F.R. § 211.54 (mineral leases); 61 Fed. Reg. 35,634, 35,650 (1996) (promulgating same, explaining "[t]he request for tribal authority to cancel leases is not included in final regulations. The mineral lease approved by the Secretary concerns lands which the Department has a statutory duty to protect. . . . [T]he final decision to cancel must remain with the Secretary."); *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1075 (9th Cir.), *cert. denied*, 464 U.S. 1017 (1983).

Thus, a challenge to a term of a mineral lease such as Peabody's here "may involve the Tribe, the Secretary [of the Interior and] the lessee-power companies in numerous legal disputes and causes of action." *Yazzie v. Morton*, 59 F.R.D. 377, 382 (D. Az. 1973). The EEOC did not even consult with the Navajo Nation prior to filing the suit against Peabody, and we understand that it did not consult the Department of the Interior, either.

In a case where such significant interests of the Navajo Nation and federal agencies are involved, the Attorney General would be the appropriate official to consider the matter before proceeding. In contrast to the single focus of the EEOC, the Department of Justice has broad responsibilities regarding, and a greater sensitivity to, larger tribal and federal interests. *See, e.g.*, 61 Fed. Reg. 29,424 (1996) (establishing the Office of Tribal Justice within the United States Department of Justice, and publishing the "Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes"); 25 U.S.C. § 175 (providing that the Justice Department shall represent Indians in all suits at

law and in equity); *see generally*, 28 U.S.C. § 519 (Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party).

Thus, even if Congress had decided to abrogate tribal sovereign immunity in Title VII, any case involving tribal interests in leases approved by the Department of the Interior would have to be handled by the Attorney General, not the EEOC, since Congress expressly withheld authority from the EEOC to proceed in any matter involving a government or government agency.

CONCLUSION

"No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." *United States ex rel. Hall v. Tribal Devel. Corp.*, 100 F.3d 476, 479 (7th Cir. 1996) (citing numerous authorities) (internal quotation marks omitted). Congress has not consented to suit against the Navajo Nation in a case brought to invalidate the terms of leases approved by and, as here, drafted by, the Department of the Interior or to invalidate Navajo Nation laws governing on-reservation economic activity.

Allowing the EEOC to join the Navajo Nation as a "Rule 19 defendant" modifies the substantive rights of both the EEOC and the Navajo Nation, and extends the jurisdiction of the district court in violation of the Rules Enabling Act and Rule 82. And Congress specifically withheld from the EEOC the ability to bring suit in cases "involving" a government or government agency. Only the

Attorney General may pursue such actions under Title VII.

For the foregoing reasons, as well as those set forth in the Petition, certiorari should be granted.

Respectfully submitted,

LOUIS DENETSOSIE
Attorney General
THE NAVAJO NATION
P.O. Box 2010
Window Rock, AZ 86515

PAUL E. FRYE
(*Counsel of Record*)
FRYE LAW FIRM, P.C.
10400 Academy Rd. NE #310
Albuquerque, NM 87111
(505) 296-9400

December 19, 2005

TITLE 5
NAVAJO NATION CODE

§ 401. Privilege of doing business – Authority to grant, deny or withdraw

The Navajo Nation Council, in order to promote the further economic development of the Navajo People, and in order to clearly establish and exercise the Navajo Nation's authority to regulate the conduct and operations of business within the Navajo Nation, hereby declares that the Navajo Nation has the sole and exclusive authority to grant, deny, or withdraw the privilege of doing business within the Navajo Nation, except where such authority is withdrawn from the Navajo Nation by the Constitution and applicable laws of the United States

---

§ 402. Businesses presently operating within the Navajo Nation

The privilege of doing business is hereby expressly granted to those businesses presently operating within the Navajo Nation pursuant to leases or permits for the use of land, or pursuant to contractual agreements with the Navajo Nation, its enterprises, and agencies subject to the control or supervision of the Navajo Nation Council or the Economic Development Committee, or with the lessees of the Navajo Nation.

---

§ 403. Conditions for continuation

The grant of the privilege of doing business within the Navajo Nation contained in 5 NNC §402 is conditioned upon the business' compliance with the applicable laws of the Navajo Nation and upon the continuing effect or validity of prior leases, permits, or contracts authorizing the business to enter upon lands subject to the jurisdiction of the Navajo Nation.

---

§ 404. Revocation; modification or alteration of privilege

The Navajo Nation Council reserves the right to revoke this grant of the privilege of doing business within the Navajo Nation; to modify, limit or otherwise alter the extent of this grant; and to establish and enact such laws relating to the establishment or conduct of business within the Navajo Nation as it may deem desirable.

TITLE 15
NAVAJO NATION CODE

SECTION

601. Title
602. Purpose
603. Definitions
604. Navajo employment preference
605. Reports
606. Union and employment agency activities; rights of Navajo workers
607. Navajo Prevailing wage
608. Health and safety of Navajo workers
609. Contract compliance
610. Monitoring and enforcement
611. Hearings
612. Remedies and sanctions
613. Appeal and stay of execution
614. Non-Navajo spouses
615. Polygraph test
616. Rules and regulations
617. Prior inconsistent law repealed
618. Effective date and amendment of the Act
619. Severability of the Act

§ 601. Title

This Act shall be cited as the Navajo Preference in Employment Act.

---

§ 602. Purpose

A. The purposes of the Navajo Preference in Employment Act are:

1. To provide employment opportunities for the Navajo work force;

2. To provide training for the Navajo People;

3. To promote the economic development of the Navajo Nation;

4. To lessen the Navajo Nation's dependence upon off-Reservation sources of employment, income, goods and services;

5. To foster the economic self-sufficiency of Navajo families;

6. To protect the health, safety, and welfare of Navajo workers; and

7. To foster cooperative efforts with employers to assure expanded employment opportunities for the Navajo work force.

B. It is the intention of the Navajo Nation Council that the provisions of this act be construed and applied to accomplish the purposes set forth above.

---

§ 603. Definitions

A. The term "Commission" shall mean the Navajo Nation Labor Commission.

B. The term "employment" shall include, but is not limited to, the recruitment, hiring, promotion, transfer, training, upgrading, reduction-in-force, retention, and recall of employees.

C. The term "employer" shall include all persons, firms, associations, corporations, and the Navajo Nation and all of its agencies and instrumentalities, who engage the services of any person for compensation, whether as employee, agent, or servant.

D. The term "Navajo" means any enrolled member of the Navajo Nation.

E. The term "ONLR" means the Office of Navajo Labor Relations.

F. The term "probable cause" shall mean a reasonable ground for belief in the existence of facts warranting the proceedings complained of.

G. The term "territorial jurisdiction" means the territorial jurisdiction of the Navajo Nation as defined in 7 NNC §254.

H. The term "counsel" or "legal counsel" shall mean: (a) a person who is an active member in good standing of the Navajo Nation Bar Association and duly authorized to practice law in the courts of the Navajo Nation; and (b) for the sole purpose of co-counseling in association with a person described in clause (a), an attorney duly authorized, currently licensed and in good standing to practice law in any state of the United States who has, pursuant to written request demonstrating the foregoing qualifications and good cause, obtained written approval of the Commission to appear and participate as co-counsel in a particular Commission proceeding.

I. The term "necessary qualifications" shall mean those job-related qualifications which are essential to the performance of the basic responsibilities designated for each employment position including any essential qualifications concerning education, training and job-related experience, but excluding any qualifications relating to ability or aptitude to perform responsibilities in other employment positions. Demonstrated ability to perform

essential and basic responsibilities shall be deemed satisfaction of necessary qualifications.

J. The term "qualifications" shall include the ability to speak and/or understand the Navajo language and familiarity with Navajo culture, customs and traditions.

K. The term "person" shall include individuals; labor organizations; tribal, federal, state and local governments, their agencies, subdivisions, instrumentalities and enterprises; and private and public, profit and non-profit, entities of all kinds having recognized legal capacity or authority to act, whether organized as corporations, partnerships, associations, committees, or in any other form.

L. The term "employee" means an individual employed by an employer.

M. The term "employment agency" means a person regularly undertaking, with or without compensation, to procure employees for an employer or to obtain for employees opportunities to work for an employer.

N. The term "labor organization" or "union" means an organization in which employees participate or by which employees are represented and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours or other terms and conditions of employment, including a national or international labor organization and any subordinate conference, general committee, joint or system board, or joint council.

O. The term "petitioner" means a person who files a complaint seeking to initiate a Commission proceeding under the Act.

P. The term "respondent" means the person against whom a complaint is filed by a petitioner.

Q. The term "Act" means the Navajo Preference in Employment Act.

---

§ 604. Navajo employment preference

A. All employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contract with the Navajo Nation shall:

1. Give preference in employment to Navajos. Preference in employment shall include specific Navajo affirmative action plans and timetables for all phases of employment to achieve the Navajo Nation goal of employing Navajos in all job classifications including supervisory and management positions.

2. Within 90 days after the later of: (a) the effective date of this §604(A)(2); or (b) the date on which an employer commences business within the territorial jurisdiction of the Navajo Nation, the employer shall file with ONLR a written Navajo affirmative action plan which complies with this section and other provisions of the Act. In any case where a labor organization represents employees of the employer, the plan shall be jointly filed by the employer and labor organization. Any such associated labor organization shall have obligations under this section equivalent to those of the employer as to employees represented by such organization. Failure to file such a plan within the prescribed time limit, submission of a plan which does not comply with the requirements of the Act, or failing to implement or comply with the terms of a conforming plan shall constitute a violation of the

Act. In the event of a required joint plan by an employer and associated labor organization, only the non-complying party shall be deemed in violation of the Act, as long as the other party has demonstrated a willingness and commitment to comply with the Act.

3. Subject to the availability of adequate resources, ONLR shall provide reasonable guidance and assistance to employers and associated labor organizations in connection with the development and implementation of a Navajo affirmative action plan. Upon request, ONLR shall either approve or disapprove any plan, in whole or in part. In the event of approval thereof by ONLR, no charge shall be filed hereunder with respect to alleged unlawful provisions or omissions in the plan, except upon 30 days prior written notice to the employer and any associated labor organization to enable voluntary correction of any stated deficiencies in such plan. No charge shall be filed against an employer and any associated labor organization for submitting a non-conforming plan, except upon 30 days prior notice by ONLR identifying deficiencies in the plan which require correction.

B. Specific requirements for Navajo preference:

1. All employers shall include and specify a Navajo employment preference policy statement in all job announcements and advertisements and employer policies covered by this Act.

2. All employers shall post in a conspicuous place on its premises for its employees and applicants a Navajo preference policy notice prepared by ONLR.

3. Any seniority system of an employer shall be subject to this Act and all other labor laws of the Navajo Nation. Such a seniority system shall not operate to defeat nor prevent the application of the Act,

provided, however, that nothing in this Act shall be interpreted as invalidating an otherwise lawful and *bona fide* seniority system which is used as a selection or retention criterion with respect to any employment opportunity where the pool of applicants or candidates is exclusively composed of Navajos or of non-Navajos.

4. The Navajo Nation when contracting with the federal or state governments or one of its entities shall include provisions for Navajo preference in all phases of employment as provided herein. When contracting with any federal agency, the term Indian preference may be substituted for Navajo preference for federal purposes, provided that any such voluntary substitution shall not be construed as an implicit or express waiver of any provision of the Act nor a concession by the Navajo Nation that this Act is not fully applicable to the federal contract as a matter of law.

5. All employers shall utilize Navajo Nation employment sources and job services for employee recruitment and referrals, provided, however, that employers do not have the foregoing obligations in the event a Navajo is selected for the employment opportunity who is a current employee of the employer.

6. All employers shall advertise and announce all job vacancies in at least one newspaper and radio station serving the Navajo Nation, provided, however, that employers do not have the foregoing obligations in the event a Navajo is selected for the employment opportunity who is a current employee of the employer.

7. All employers shall use non-discriminatory job qualifications and selection criteria in employment.

8. All employers shall not penalize, discipline, discharge nor take any adverse action against any Navajo employee without just cause. A written notification to the employee citing such cause for any of the above actions is required in all cases.

9. All employers shall maintain a safe and clean working environment and provide employment conditions which are free of prejudice, intimidation and harassment.

10. Training shall be an integral part of the specific affirmative action plans or activities for Navajo preference in employment.

11. An employer-sponsored cross-cultural program shall be an essential part of the affirmative action plans required under the act. Such program shall primarily focus on the education of non-Navajo employees, including management and supervisory personnel, regarding the cultural and religious traditions or beliefs of Navajos and their relationship to the development of employment policies which accommodate such traditions and beliefs. The cross-cultural program shall be developed and implemented through a process which involves the substantial and continuing participation of an employer's Navajo employees, or representative Navajo employees.

12. No fringe benefit plan addressing medical or other benefits, sick leave program or any other personnel policy of an employer, including policies jointly maintained by an employer and associated labor organization, shall discriminate against Navajos in terms or coverage as a result of Navajo cultural or religious traditions or beliefs. To the maximum extent feasible, all of the foregoing policies shall accommodate and recognize in coverage such Navajo traditions and beliefs.

C. Irrespective of the qualifications of any non-Navajo applicant or candidate, any Navajo applicant or candidate who demonstrates the necessary qualifications for an employment position:

1. Shall be selected by the employer in the case of hiring, promotion, transfer, upgrading, recall and other employment opportunities with respect to such position; and

2. Shall be retained by the employer in the case of a reduction-in-force affecting such class of positions until all non-Navajos employed in that class of positions are laid-off, provided that any Navajo who is laid-off in compliance with this provision shall have the right to displace a non-Navajo in any other employment position for which the Navajo demonstrates the necessary qualifications.

3. Among a pool of applicants or candidates who are solely Navajo and meet the necessary qualifications, the Navajo with the best qualifications shall be selected or retained, as the case may be.

D. All employers shall establish written necessary qualifications for each employment position in their work force, a copy of which shall be provided to applicants or candidates at the time they express an interest in such position.

* * *